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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/032,701
Filing Date: December 28, 2001
Appellant(s): RICHLEN ET AL.

MAILED
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GROUP 3700

Andrew D. Stover
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 5-10-06 appealing from the Office action mailed 10-31-05.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

WITHDRAWN REJECTIONS

The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner. With regard to Ground I, set forth in section (6) of the Brief, the process by product argument, i.e. argument (3) as argued by Appellant, has been withdrawn.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

2 267 024	IGAUE et al (UK)	11=1993
00/47152	VAN GOMPEL et al (PCT)	08-2000

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Language Interpretation

The directional terms are defined as set forth on page 5, lines 4-27. "Releasably engaged" is defined as set forth on page 6, lines 12-19. "Fixedly secured" is defined as set forth on page 6, lines 20-24. "Line of weakness" is defined as set forth on page 7, lines 12-20. "Body panel" is defined as set forth on page 18, lines 3-7. "Nonwoven" is defined as set forth in the sentence bridging pages 19-20. Attention is invited to the paragraph bridging pages 25-26, i.e. while the testing protocol on pages 36 et seq is preferred it is not required, i.e. the claims do not limit the testing protocol to that set forth on pages 36 et seq. It is also noted that the length of the panel, see discussion of the testing protocols, has not been set forth. It is noted that the body panel is not limited to a single layer of material, i.e. the line of weakness can be in only one layer of a multilayer panel as claimed. Also note that a fastener is claimed only in claims 16 and 35 and page 1, lines 5-19 and page 2, lines 15-18.

Ground 1:

Claims 11-20, 31-40 and 45-46 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Igaue et al GB '024.

It is noted that for the purposes of discussion below claim 11, 14 and 16, respectively, is believed to the broadest claim in each of the three groups of claims designated by Appellant, i.e. as set forth in MPEP 1205 the “single claim from the group of claims that are argued together” used “to decide the appeal with respect to the group of claims as to the ground of rejection”.

Claims 11-20 and 45: See claim language interpretation section supra and Igaue et al at Figures, abstract lines 3 et seq, page 2, last paragraph, page 9, line 17-page 11, line 2. The front panel is 1, the rear panel is 2 and is connected to the front panel by seam 8, the line of weakness is 9b, the elastomeric material is 14-15 and the fastener member is 5 and 6. Therefore, the Igaue reference clearly teaches all the claimed limitations except for the specific tear and tensile strengths. On page 2, lines 15-18 of the instant disclosure, Appellants set forth the purpose of the tensile and tear strengths is to allow breakage along a line of weakness to convert a pant-type garment to an open product without undue effort (It is noted that the terminology “undue effort” is considered relative). The claimed strengths are disclosed as those preferred. While Igaue et al does not explicitly teach the strengths (see Claim Language Interpretation section supra), see the portions of the Igaue reference cited supra which also teach an absorbent garment which converts from a pant-type garment into an open product simply by providing a line of weakness, i.e. a tear line, so as to allow the user to tear, i.e. break, the garment along such line. Thus, and additionally considering the lack of claiming a specific testing protocol, it is the Examiner’s first position that there is sufficient factual basis for one to conclude that the Igaue et al panel would inherently include the claimed strengths when tested, at the very least, according to some testing protocol, and, at the very most, according to Appellant’s preferred testing protocol. Note MPEP 2112.01. In any case, it is the Examiner's second position that even if the Igaue reference does

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not include the exact strength ranges, the general conditions of the claims are disclosed by the Igaue, see discussion of Appellant's purpose and the purpose of Igaue supra, and it is not inventive, i.e. it would be obvious to one of ordinary skill in the art, to discover the optimum or workable ranges, i.e. Appellant's claimed strengths, by routine experimentation, In re Aller, 105 USPQ 233 (CCPA 1955).

With regard to claims 31-40 and 46, the steps of the method are inherently, see MPEP 2112.02, or are necessarily and inevitably performed during use of the Igaue et al device.

Ground 2:

Claims 42, 44 and 47-48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Igaue et al GB '024 in view of Van Gompel PCT '152.

Appellant further claims the front and rear body panels having terminal crotch edges spaced apart to define a gap and an absorbent composite bridging the gap and connected to the panels. Igaue et al teaches a unitary front and rear connected to an absorbent composite with a tearable line of weakness adjacent a side seam. However Van Gompel PCT '152 at Figures 1-3, the sentence bridging pages 4-5, page 5, lines 27-28, i.e. infers the body panel 52 can have a length which are not less than the article length 26, the paragraph bridging pages 26-27, element 40, page 35, lines 4-5, i.e. open type diaper or pants type garment designed with a unitary front and rear connected to an absorbent composite or with front and rear panels having terminal crotch edges spaced apart to define a gap, i.e. nonunitary front and rear panels, and an absorbent composite bridging the gap and connected to the panels. Therefore, to make the pants designed with a unitary front and rear connected to an absorbent composite of Igaue et al pants designed

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with front and rear panels having terminal crotch edges spaced apart to define a gap and an absorbent composite bridging the gap instead would be obvious in view of the interchangeability as taught by Van Gompel et al. In so doing the prior art references teach the garment and method as using as claimed.

(10) Response to Argument

Ground 1:

Group 1, Argument A:

Appellant's arguments bridging pages 7-8 of the Brief with regard to the 102 rejection of claim 11 over Igaue et al has been considered. It is noted that Appellants argue tensile strengths and claim 11 does not claim a tensile strength, i.e. narrower than the claim language. It is also noted the first two paragraphs are substantially identical to those filed 2-11-05 and 8-18-05 and thereby, they are deemed not persuasive for the same reasons (i.e. They are narrower than the bases for rejection, the claim language, the teachings of the prior art and the scope of the instant disclosure. For example, as set forth supra, the claims do not set forth even what specific testing protocol is used to determine the claimed tear strength. Nor does the specification limit the testing protocol to any one specific protocol. So while it is agreed that tear strength depends on many parameters, the tear strength also depends on the test used to determine it, i.e. if many things can affect tensile strength, e.g. the size of a sample, then it follows that the manner in which such tensile strength is tested, e.g. the size of the sample required by the testing protocol, will also affect the determination thereof. See, e.g., Applicant's own remarks on page 14, second

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full paragraph of the 1-9-04 response, i.e. the size of the sample tested, i.e. the testing protocol used, makes a difference in the strength measured. Therefore, as set forth supra, there is sufficient factual basis to conclude that the Igaue et al device would inherently include the claimed strengths, at the very least according to some testing protocol and at the very most according to Applicant's preferred protocol. The claims also do not require any specific materials and/or perforations of any particular structural dimensions.) It is also noted, however, with regard to the materials that the Igaue et al body panel materials through which the lines of weakness are created are the same, i.e. non woven and elastic materials, see paragraph bridging pages 7-8 and first full paragraph on page 9 of Igaue et al. With regard to Appellant's arguments on page 8, second full paragraph of the Brief, see again the discussion supra, and , e.g., Appellants remarks on page 14 of the 1-9-04 response. Therefore, while the body panel either has the claimed property or not, the testing protocol determines how such property is expressed.

Group 1, Argument B:

Appellants arguments on pages 8-10 of the Brief with regard to the 103 rejection of claim 11 has been considered. It is noted that Appellants argue tensile strengths and claim 11 does not claim a tensile strength, i.e. narrower than the claim language. It is also noted that that claim 11 is an apparatus claim not a method of manufacture claim. It is noted such arguments are substantially identical to those filed 2-11-05 and 8-18-05 and they are deemed not persuasive for the same reason (i.e. A reference that remains silent as to specific tear strengths does not teach away from the claimed tear strengths. In any case, the Igaue reference does not remain silent

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with regard to tear strength because it at least teaches that the tear strength has to be that which allows it to function as disclosed. See discussion supra. Note claim 11 doesn't require the use of fasteners across the line of weakness during the manufacturing process and the disclosure which only express a preference for certain strengths.)

Group 1, Argument C:

Since this rationale has been withdrawn, Appellant's arguments on page 10 are deemed moot.

Group 2:

Appellants' arguments bridging pages 11-12 of the Brief have been considered but are deemed not persuasive. Specifically, Appellants 1) argue that claim 14 is patentable for the reasons set forth with respect to claim 11, 2) rely on alleged assertions set forth in an Office Action other than the FINAL of 10-31-05, 3) argue that the tensile strength of the prior art to Igaue et al converted to be consistent to the preferred but not claimed testing protocol is 6.62 lbf and claim 14 requires a tensile strength of "less than about 6.62 lbf" (emphasis added). With regard to 1), such arguments are deemed not persuasive for the same reasons discussed with regard to claim 11 supra. With regard to 2), such remarks are deemed irrelevant since such assertions are not set forth in the FINAL of 1-31-05. With regard to 3), see the remarks with regard to the testing protocol with respect to claim 11 supra. In any case Igaue et al does not teach away from a tensile strength of less than about 6.62 lbf. Note Appellant's remarks that Igaue's bond strength converts to 6.62 lbf according to the preferred but not claimed testing

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protocol. The claim terminology “less than about 6.62 lbf” does not limit the strengths to those just less than 6.62 lbf, i.e. the terminology “about” allows some leeway from the value it describes, i.e. argueably “less than about 6.62lbf” includes 6.62 lbf. Finally, again the claims do not set forth even what specific testing protocol is used to determine such claimed tensile strength. Note again Applicant’s own remarks on page 14 of the 1-9-04 response.

Group 3:

Appellants’ arguments bridging pages 12-13 of the Brief have been considered but are deemed not persuasive. Specifically, Appellants 1) argue that claim 16 is patentable for the reasons set forth with respect to claim 11, and 2) argue lack of disclosure by Igaue et al of several manufacturing steps. With regard to 1), such arguments are deemed not persuasive for the same reasons discussed with regard to claim 11 supra. With regard to 2), such remarks are deemed not persuasive because apparatus claim 16 does not require the argued method steps but does teach the claimed structure, i.e. a fastener member bridging the line of weakness, fixedly secured on one side and releasably engaged with the other, see right side of Figure 1 of Igaue et al.

The rejection of claims 11-20, 31-40 and 45-46 under 35 USC 102(b) or, in the alternative, 35 USC 103 (a) is deemed proper and maintained.

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Ground 2:

Since Appellant's relies on the same reasons set forth in Ground 1, the arguments set forth on page 13 of the Brief are deemed not persuasive for the same reasons as set forth in Ground 1 supra.

The rejection of claims 42, 44, 47 and 48 under 35 USC are deemed proper and maintained.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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